IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 14TH AUGUST 2007 / 23RD SRAVANA 1929

Crl.Rev.Pet.No. 4127 of 2006()

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AGAINST THE ORDER IN CC 136 2004 IN CMP.574/2006 of JUDL.MAGISTRATE OF FIRST CLASS-II(MOBILE),ALAPPUZHA

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REVN. PETITIONER:

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SHERRY K.JOSEPH,
S/O. K.C. JOSEPH, AGED 45 YEARS
KANDATHIL HOUSE, CHUNGAM, ALAPPUZHA

BY ADV. SRI.G.PRIYADARSAN THAMPI

RESPONDENTS:

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1. FRANCIS T. CHACKO,
AGED ABOUT 48 YEARS,
THENGUMMOTTIL HOUSE, CULLEN ROAD,
NEAR UMCA, ALAPPUZHA

2. PRAVEEN MENON, XXXV/892,PRABHALA, MANNIKKATHOTH CROSS ROAD, VALAMJAMBALAM, COCHIN

3. STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM

BY ADV. SRI.R.SATISH KUMAR
SRI.V.N.ACHUTHA KURUP (SR.)
SRI.BIJU ABRAHAM
PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 16/07/2007, THE COURT ON 14-08-2007 THE SAME DAY PASSED THE FOLLOWING:

**V. RAMKUMAR, J.**

**.....**

**Crl. R.P. No.4127 of 2006**

**.....**

**Dated, this the 14th day of August 2007**

**O R D E R**

The complainant in C.C. No. 136 of 2004 on the file of J.F.C.M.-II, Alappuzha challenges the order dated 10-11-2006 in C.M.P. 574 of 2006 passed by the magistrate dismissing the application filed by the revision petitioner to alter the charge.

2. The learned counsel appearing for the revision petitioner made the following submissions in support of the revision:-

In the month of July 2001 A1 who was known to the complainant approached him and requested for a friendly loan of Rs. 24,00,000/-. A2 assured that he will repay the said amount in 21 months. Believing A1, the complainant gave the amount to A1 who handed over three post-dated cheques issued by his friend A2 in discharge of the liability to A1. Out of the three cheques the present complaint relates to Cheque No.8989593 drawn on the Shanmugham Road, Kochi, Branch of Dhanalakshmi Bank for Rs. 7,00,000/- dated 20-3-2003. When the cheque was presented through the Mullakkal Branch of Canara Bank at Alappuzha it was dishonoured stating “funds insufficient”. The borrowal of the money was by the first accused and in order to

discharge the liability of A1, the 2nd accused had issued the cheques. Statutory notice was issued to both the accused who, however, failed to make the payment. The cheques were issued to cheat the complainant and to cause wrongful loss to him. The accused had issued the cheques with the ulterior motive and with the full knowledge that the same would be dishonoured when presented for encashment. It is understood from the acts of the accused that the borrowal was made under pre-planning and with the dishonest intention to cheat the complainant by extracting huge amount and making wrongful gain to the accused. The accused are, therefore, liable to be punished for offences punishable under Sec. 420 I.P.C. and Sec. 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as “the Act” for short). Annexure A1 complaint contained the necessary averments as above. It was by way of an accidental omission that the learned Magistrate took cognizance only for the offence punishable under Sec. 138 of the Act. Since no offence punishable under Section 138 of the Act will lie against A1, the revision petitioner/complainant filed C.M.P. 574/'06 under Section 216 Cr.P.C. for altering the charge by incorporating Sec. 420 also. The view of the Magistrate that there is no dishonest intention alleged in the complaint so as to make out an offence punishable under Sec. 420 I.P.C. is unsustainable since there are necessary averments in that

behalf in the complaint. Similarly, the view of the Magistrate that an identical complaint is pending before the Bombay Court thereby attracting Article 20(2) of the Constitution of India and Sec. 300 Cr.P.C. is also erroneous. The decision reported in **Anto v. Union of India - 1991 (2) KLT 341** will show that a complaint under Sec. 138 of the N.I.Act and 420 I.P.C. is maintainable. If the guiding principle for framing charge is the existence of a prima facie case, for alteration of the charge also, the same yardstick should be followed.

3. I am afraid that I cannot agree with the above submissions. Going by the averments in the complaint A2 who is a friend of A1 was executing the cheques in question by undertaking the liability of A1 who borrowed the sum of Rs. 24,00,000/- from the complainant. The learned Magistrate has specifically observed that cognizance on the complaint was taken only in respect of the offence punishable under Section 138 of the Act and cognizance was not taken in respect of the offence punishable under Sec. 420 I.P.C. Admittedly, the cheques issued were post-dated cheques and if the promise made thereunder was broken, a prosecution under Section 420 I.P.C. will be misconceived.**(Vide Reghunathan v. Balasubramonian - 1967 KLT 232).** Going by the averments in the complaint it cannot be said that a prosecution of A2 under Section 138 of the Act will not lie. Similarly, from the averments in the complaint itself it is difficult to

discern that at the time of borrowing the amount A1 had a dishonest intention to cheat the complainant so as to make out an offence punishable under Sec. 420 I.P.C. Moreover, the complainant is prosecuting the accused in the Mumbai Court for the very same offences involving the 3 cheques including the cheque in question. The learned Magistrate was, therefore, fully justified in dismissing the petition for altering the charge so as to incorporate the offence punishable under Sec. 420 I.P.C. in respect of which no cognizance had been at the threshold.

This Revision which is bereft of any merit is accordingly dismissed.

***V. RAMKUMAR, JUDGE***

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